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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the indictment is not reported. A copy is annexed hereto.

JURISDICTION

The order of the district court dismissing the indictment on the ground that it does not state an offense under 18 U. S. C. 371 was entered on September 8, 1958. Notice of appeal to this Court was filed in the district court on October 7, 1958. The jurisdiction of this Court to review, on direct appeal, a judgment dismissing an indictment, because of a construction of the statute on which the indictment is founded, is conferred by 18 U, S. C. 3731.

STATUTE INVOLVED

18 U. S. C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

QUESTION PRESENTED

Whether 18 U. S. C. 371, punishing conspiracy of two or more persons to commit an offense against the United States, covers a conspiracy between husband and wife.

STATEMENT

The indictment charged that petitioners, who are husband and wife, conspired with each other to smuggle and illegally import into the United States psittacine birds, and to conceal and transport the birds after illegal importation. Petitioners moved to dismiss on the ground that the indictment failed to charge an offense. The district court dismissed the indictment on the authority of *Dawson* v. *United States*, 10 F. 2d 106, certiorari denied, 271 U. S. 687,[1] and *Gros* v. *United States*, 138 F. 2d 261, two decisions of the Ninth Circuit to the effect that a husband

[1] Certiorari had been sought on other grounds by the defendants whose convictions on substantive counts had been affirmed.

and wife are incapable of engaging in a criminal conspiracy.

THE QUESTION IS SUBSTANTIAL

The district court, under the compulsion of prior rulings by the Court of Appeals for the Ninth Circuit, has held that 18 U. S. C. 371, punishing "two or more persons" who conspire to commit an offense against the United States, does not apply to two persons who are husband and wife. This construction of the statute is based on the common law concept of the unity of husband and wife. It is, we submit, an improper construction of the conspiracy statute based upon an outmoded concept.[2] It has been explicitly rejected by the Court of Appeals for the District of Columbia Circuit in *Johnson* v. *United States,* 157 F. 2d 209, and by the Court of Appeals for the Fifth Circuit in *Thompson* v. *United States,* 227 F. 2d 671, and *Wright* v. *United States,* 243 F. 2d 569. In the *Johnson* case, the court said (157 F. 2d at 209):

> * * * No reason remains why the law should not recognize the obvious fact that the relation of husband and wife does not prevent two persons from conspiring to commit an offense. The interest of society in repressing crime requires that the fact be recognized, and our common law system does not require that its recognition await express legislative action.

The question is obviously an important one in the enforcement of criminal law. Since many federal

[2] The rule of evidence which bars a husband or wife from testifying against the spouse is founded on present-day considerations wholly independent of the concept of marital unity, as this Court's opinion in *Hawkins* v. *United States*, No. 20, decided November 24, 1958, demonstrates.

statutes do not proscribe an attempt to commit the particular crime involved, a husband and wife who make elaborate arrangements to violate the law may escape punishment completely if they are apprehended before a substantive violation has occurred. The conflict among the courts of appeals on this basic question of the law of conspiracy should be resolved by this Court.

CONCLUSION

It is respectfully submitted that the Court should note probable jurisdiction of this appeal.

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DECEMBER 1958.

APPENDIX

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In the United States District Court in and for The Southern District of California, Southern Division

July, 1958, Grand Jury—Southern Division
No. 27809–CR–SD

UNITED STATES OF AMERICA, PLAINTIFF

v.

LUCILLE ALDINE DEGE AND ERNEST DEGE, DEFENDANTS

Order dismissing indictment

In the above-entitled action the motion of Lucille Aldine Dege and the motion of Ernest Dege, defendants therein, that the Indictment be dismissed on the following grounds and for the following reasons:

That said Indictment does not state facts sufficient to constitute a cause of action against these defendants or either of them;

That said Indictment does not state a public offense against the United States;

came on regularly to be heard on Monday, September 8th, 1958, at 10:00 o'clock a. m., in the above-entitled Court in Courtroom Two, located at the Federal Building at 325 West "F" Street, San Diego, California, the Honorable James Carter, a Judge of the above-entitled Court presiding, the United States of America, Plaintiff, being represented by Peter J. Hughes, Assistant United States Attorney, and the defendants Lucille Aldine Dege and Ernest Dege, being represented by their attorneys of record with Thomas Whelan appearing, and said Motions of said defendants having been presented, and the same being submitted to the Court for decision and the Court being fully advised in the premises:

It is hereby ordered on the authority of *Dawson* v. *United States,* 10 Fed. 2d, 106, and *Gros* v. *United States,* 138 Fed. 2d, 261, that the motion of each defendant is granted, and the Indictment against the defendants is dismissed as to each defendant.

Done in open Court this 8th day of September, 1958.

JAMES M. CARTER,
Judge of the United States District Court.